

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA  
AT ELKINS**

**WEST VIRGINIA  
HIGHLANDS CONSERVANCY  
OHIO VALLEY ENVIRONMENTAL  
COALITION, and SIERRA CLUB,**

ELECTRONICALLY  
FILED  
Aug 20 2019  
U.S. DISTRICT COURT  
Northern District of WV

**Plaintiffs,**

**v.**

**CIVIL ACTION NO. 2:19-CV-41 (Kleeh)**

**BROOKS RUN MINING COMPANY, LLC**

**Defendant.**

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR CIVIL  
PENALTIES**

**INTRODUCTION**

1. This is a citizen suit for declaratory and injunctive relief against Defendant Brooks Run Mining Company, LLC (“Brooks Run”) for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (hereafter the Clean Water Act (“CWA”)), and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. (hereafter “SMCRA”), at its Seven Pines Mine in Webster County, West Virginia.

2. As detailed below, Plaintiffs allege that Brooks Run is in violations of Section 301 of the CWA, 33 U.S.C. § 1311, and the conditions of its West Virginia/National Pollutant Discharge Elimination System (“WV/NPDES”) Permit WV1009885.

3. Plaintiffs further allege that Brooks Run’s discharges of pollutants into waters adjacent to its Seven Pines Mine violate the performance standards under SMCRA, and the terms

and conditions of the West Virginia Surface Coal Mining and Reclamation (“WVSCMRA”) permit S201002.

### **JURISDICTION AND VENUE**

4. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 33 U.S.C. § 1365 (CWA’s citizen suit provision), and 30 U.S.C. § 1270 (SMCRA citizen’s suit provision).

5. On June 4, 2019, Plaintiffs gave notice of the violations and their intent to file suit to the Defendant, the United State Environmental Protection Agency (“EPA”), the Office of Surface Mining Reclamation and Enforcement (“OSMRE”), and the West Virginia Department of Environmental Protection (“WVDEP”) as required by Section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A), and Section 520(b)(1)(A) of SMCRA, 30 U.S.C. § 1270(b)(1)(A).

6. On June 19, 2019, Plaintiffs gave a second notice of the violations to the Defendant’s parent corporation and its registered agent.

7. More than sixty days have passed since either notice was sent. EPA, OSMRE, and/or WVDEP have not commenced or diligently prosecuted a civil or criminal action to redress the violations. Moreover, neither EPA nor WVDEP commenced an administrative penalty action subject to 309(g) of the CWA 33, U.S.C. § 1319(g), or a comparable state law to redress the violations prior to the issuance of either notice letter.

8. Venue in this district is proper pursuant to 33 U.S.C. § 1365(c)(1) because the sources of the CWA violations are located in this District and pursuant to 30 U.S.C § 1270(c) because the coal mining operations complained of are located in this District.

## **PARTIES**

9. Brooks Run is a West Virginia limited liability company engaged in the business of coal mining.

10. Brooks Run is a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and Section 701(19) of SMCRA, 30 U.S.C. § 1291(19).

11. Plaintiff Ohio Valley Environmental Coalition is a nonprofit organization incorporated in Ohio. Its principal place of business is in Huntington, West Virginia. It has approximately 400 members. Its mission is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership development, and media outreach. The Coalition has focused on water quality issues and is a leading source of information about water pollution in West Virginia.

12. The West Virginia Highlands Conservancy is a nonprofit organization incorporated in West Virginia in 1967. Its volunteer board of directors and approximately 1,500 members work for the conservation and wise management of West Virginia's natural resources. As one of West Virginia's oldest environmental activist organizations, the West Virginia Highlands Conservancy is dedicated to protecting clean air, clean water, forests, streams, mountains and the health and welfare of the people that live in the Mountain State and for those who visit to recreate.

13. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with more than 768,000 members and supporters nationwide, including approximately 2,600 members who reside in West Virginia and belong to its West Virginia Chapter. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of Earth's resources and ecosystems; to educating and enlisting humanity to protect

and restore the quality of the natural and human environment; and to using all lawful means to carrying out these objectives. The Sierra Club's concerns encompass the exploration, enjoyment and protection of surface water in West Virginia.

14. Plaintiffs have members who use, enjoy and benefit from the water quality in the Birch River, Laurel Creek, their tributaries, and associated natural resources. They would like to recreate in areas downstream from Brooks Run's operations, but excessive amounts of pollutants harmful to the aquatic ecosystem make the water aesthetically unpleasant and environmentally undesirable. Those same pollutants are discharged in significant quantities from Brooks Run's Seven Pines Mine into the Birch River, Laurel Creek, and their tributaries. Both Laurel Creek and the Birch River are designated by the WVDEP as biologically impaired. Three streams receiving discharges from the Seven Pines Mine—an unnamed tributary of Missouri Creek, Missouri Creek, and Glade Run—are listed as impaired for selenium.

15. One such member is Chad Cordell. Mr. Cordell has been visiting the areas downstream from the Seven Pines Mine for several years. He passes by the area on his way to some of his favorite fishing spots on the Williams River. Since the Seven Pines Mine has been operational, Mr. Cordell has been concerned about the impacts on water quality. He frequently stops to take measurements of pollutants and to observe any changes to the stream. He fears that the mine is harming aquatic life in the streams receiving discharges, particularly since many of the streams are listed as impaired. He would like to fish in the Birch River, and Laurel Creek, as they are much closer to his home than the Williams River, but he does not because of the mine pollution.

16. If Brooks Run's unlawful discharges ceased, the harm to the interest of Plaintiffs' members would be redressed. An injunction would redress Plaintiffs' members injuries by preventing further violations of the limits in Brooks Run's permits.

17. At all relevant times, Plaintiffs were and are “persons” as that term is defined by the CWA, 33 U.S.C. § 1362(5) and SMCRA, 30 U.S.C. § 1291(19).

### **STATUTORY AND REGULATORY FRAMEWORK**

18. Section 301 of the CWA, 33 U.S.C. § 1311(a), prohibits the “discharge of any pollutant by any person” into waters of the United States except in compliance with the terms of a permit, such as a National Pollutant Discharge Elimination System (“NPDES”) permit issued by EPA or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

19. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the permit-issuing authority may issue NPDES permits that authorize the discharge of pollutants directly into waters of the United States, upon the condition that such discharge will meet all applicable requirements of the CWA and other such conditions as the permit authority determines necessary to carry out the provisions of the CWA.

20. Section 303(a) of the CWA, 33 U.S.C. § 1313(a), requires that states adopt ambient water quality standards and establish water quality criteria for particular water bodies that will protect designated uses of the water.

21. The Administrator of EPA authorized WVDEP, pursuant to Section 402(a)(2) of the Act, 33 U.S.C. § 1342(a)(2), to issue NPDES permits on May 10, 1981. 47 Fed. Reg. 2263. The applicable West Virginia law for issuing NPDES permits is the West Virginia Water Pollution Control Act, W.Va. Code § 22-11-1, et seq.

22. Section 505(a) of the CWA, 33 U.S.C. § 1365(a), authorizes any “citizen” to “commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter.”

23. Section 505(f) of the CWA, 33 U.S.C. § 1365(f), defines an “effluent standard or limitation under this chapter,” for purposes of the citizen suit provision in Section 505(a) of the CWA, 33 U.S.C. § 1365(a), to mean, among other things, an unlawful act under Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and/or “a permit or condition thereof” issued under Section 402 of the CWA, 33 U.S.C. § 1342(a).

24. In any action brought under Section 505(a) of the CWA, 33 U.S.C. § 1365(a), the district court has jurisdiction to order the defendant to comply with the CWA and to assess civil penalties.

25. Under Section 505(d) of the CWA, 33 U.S.C. § 1365(d), the court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.”

26. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, or violates any permit condition or limitation in a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty payable to the United States of up to \$25,000 per day for each violation.

27. Pursuant to the Federal Civil Penalties Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114-74, the court may assess a civil penalty of up to \$54,833 per day for each violation.

28. Section 506 of SMCRA, 30 U.S.C. § 1256, prohibits any person from engaging in or carrying out surface coal mining operations without first obtaining a permit from OSMRE or from an approved state regulatory authority.

29. At all relevant times, the State of West Virginia has administered an approved surface mining regulatory program under SMCRA. *See* 30 C.F.R. § 948.10.

30. Among the performance standards mandated by SMCRA and the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”) is that “[d]ischarges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations. . . .” 30 C.F.R. § 816.42; *see also*, W.Va. C.S.R. § 38-2-14.5.b.

31. The performance standards further require that “[a]ll surface mining and reclamation activities shall be conducted . . . to prevent material damage to the hydrologic balance outside the permit area.” W.Va. C.S.R. § 2-14.5. At minimum, “material damage” includes violations of applicable water quality standards.

32. The legislative rules promulgated under WVSCMRA provide that, as a general condition of all surface mining permits issued under the WVSCMRA, the permittee must comply with all applicable performance standards. 38 C.S.R. § 2-3.33.c.

33. Section 520(a) of SMCRA, 30 U.S.C. § 1270(a), authorizes any person adversely affected to bring an action in federal court to compel compliance with the act. 30 U.S.C. § 1270(a)(1).

34. Pursuant to 30 U.S.C. § 1270(d) the court may award the costs of litigation including attorney and expert witness fees to any party whenever the court determines such an award is appropriate.

## **FACTS**

35. Brooks Run’s mining operations at the Seven Pines Mine are regulated under West Virginia Surface Mining Permit No. S201002. That Permit was renewed on September 8, 2014.

36. Discharges from the Seven Pines mine are regulated pursuant to WV/NPDES Permit No. WV1009885. That permit was reissued on February 28, 2014.

37. The Seven Pines Mine is permitted as a mountaintop removal mine with ten valley fills. Fills 1-10 are associated with Outlets 001 through 010. Outlets 001, 002, 003, and 010 discharge into an unnamed tributary of Missouri Creek. Outlet 004 and 005 discharge to tributaries of Laurel Creek. Outlet 006 discharges to Chuffy Run; Outlet 007 to Kate Run; and Outlets 008 and 009 to Bragg Run, which are all tributaries of the Birch River. Outlets 011 through 108 are associated with drainage ditches.

38. Part C WV/NPDES Permit No. WV1009885 incorporates by reference, and therefor includes a condition, a West Virginia regulation that provides that “[the discharge or discharges covered by [this] WV/NPDES permit are to be of such quality so as not to cause a violation of applicable water quality standards promulgated by 47 CSR 2.” 47 W. Va. C.S.R. § 30-5.1.f.

#### **Violations of Selenium Limits at the Seven Pines Mine**

39. NPDES permit WV1009885 imposes limits on total recoverable selenium at Outlets 001 through 009, 014, 036, and 082.

40. In its monthly discharge monitoring reports, Brooks Run has reported the following violations of its permit limits for total recoverable selenium at the Seven Pines Mine in the following months and at the following outlets:

	<b>Month</b>	<b>Outlet</b>	<b>Limit</b>	<b>Units</b>	<b>Type</b>	<b>Reported Quantity</b>	<b>Units</b>
1	3/31/2017	004	4.7	µg/L	Avg	8.24	µg/L
2	3/31/2017	004	8.2	µg/L	Max	8.24	µg/L
3	3/31/2017	006	8.2	µg/L	Max	32.8	µg/L
4	3/31/2017	006	4.7	µg/L	Avg	29.5	µg/L
5	3/31/2017	008	8.2	µg/L	Max	33.8	µg/L
6	3/31/2017	008	4.7	µg/L	Avg	33.8	µg/L
7	4/30/2017	001	8.2	µg/L	Max	12.9	µg/L
8	4/30/2017	001	4.7	µg/L	Avg	12.9	µg/L
9	4/30/2017	004	4.7	µg/L	Avg	9.15	µg/L

10	4/30/2017	004	8.2	µg/L	Max	11	µg/L
11	4/30/2017	006	4.7	µg/L	Avg	25	µg/L
12	4/30/2017	006	8.2	µg/L	Max	28	µg/L
13	4/30/2017	007	4.7	µg/L	Avg	81.1	µg/L
14	4/30/2017	007	8.2	µg/L	Max	81.1	µg/L
15	4/30/2017	008	4.7	µg/L	Avg	29.7	µg/L
16	4/30/2017	008	8.2	µg/L	Max	29.8	µg/L
17	5/31/2017	004	4.7	µg/L	Avg	9.23	µg/L
18	5/31/2017	004	8.2	µg/L	Max	10.1	µg/L
19	5/31/2017	006	4.7	µg/L	Avg	41	µg/L
20	5/31/2017	006	8.2	µg/L	Max	45.6	µg/L
21	5/31/2017	008	8.2	µg/L	Max	28.6	µg/L
22	5/31/2017	008	4.7	µg/L	Avg	27.8	µg/L
23	6/30/2017	004	4.7	µg/L	Avg	6.37	µg/L
24	6/30/2017	006	8.2	µg/L	Max	47.9	µg/L
25	6/30/2017	006	4.7	µg/L	Avg	45.2	µg/L
26	6/30/2017	008	8.2	µg/L	Max	37.1	µg/L
27	6/30/2017	008	4.7	µg/L	Avg	31	µg/L
28	7/31/2017	006	4.7	µg/L	Avg	43.4	µg/L
29	7/31/2017	006	8.2	µg/L	Max	44.2	µg/L
30	7/31/2017	008	4.7	µg/L	Avg	49.6	µg/L
31	7/31/2017	008	8.2	µg/L	Max	55.2	µg/L
32	8/31/2017	004	4.7	µg/L	Avg	7.09	µg/L
33	8/31/2017	004	8.2	µg/L	Max	9.58	µg/L
34	8/31/2017	006	8.2	µg/L	Max	53.6	µg/L
35	8/31/2017	006	4.7	µg/L	Avg	52	µg/L
36	8/31/2017	008	8.2	µg/L	Max	33.4	µg/L
37	8/31/2017	008	4.7	µg/L	Avg	24.3	µg/L
38	9/30/2017	004	4.7	µg/L	Avg	5.71	µg/L
39	9/30/2017	006	4.7	µg/L	Avg	60.7	µg/L
40	9/30/2017	006	8.2	µg/L	Max	65.1	µg/L
41	9/30/2017	008	4.7	µg/L	Avg	12.1	µg/L
42	9/30/2017	008	8.2	µg/L	Max	16	µg/L
43	10/31/2017	004	4.7	µg/L	Avg	6.33	µg/L
44	10/31/2017	004	8.2	µg/L	Max	8.54	µg/L
45	10/31/2017	006	8.2	µg/L	Max	61.7	µg/L
46	10/31/2017	006	4.7	µg/L	Avg	61.7	µg/L
47	10/31/2017	008	8.2	µg/L	Max	9.8	µg/L
48	10/31/2017	008	4.7	µg/L	Avg	8.63	µg/L

49	11/30/2017	004	4.7	µg/L	Avg	6.56	µg/L
50	11/30/2017	008	4.7	µg/L	Avg	15.4	µg/L
51	11/30/2017	008	8.2	µg/L	Max	19	µg/L
52	12/31/2017	004	4.7	µg/L	Avg	7.11	µg/L
53	12/31/2017	008	8.2	µg/L	Max	19.6	µg/L
54	12/31/2017	008	4.7	µg/L	Avg	14.6	µg/L
55	1/31/2018	001	4.7	µg/L	Avg	6.77	µg/L
56	1/31/2018	005	4.7	µg/L	Avg	84	µg/L
57	1/31/2018	005	8.2	µg/L	Max	84	µg/L
58	1/31/2018	007	4.7	µg/L	Avg	107	µg/L
59	1/31/2018	007	8.2	µg/L	Max	107	µg/L
60	1/31/2018	009	8.2	µg/L	Max	12.8	µg/L
61	1/31/2018	009	4.7	µg/L	Avg	11.4	µg/L
62	2/28/2018	001	8.2	µg/L	Max	16.1	µg/L
63	2/28/2018	001	4.7	µg/L	Avg	12.3	µg/L
64	2/28/2018	003	8.2	µg/L	Max	13.6	µg/L
65	2/28/2018	003	4.7	µg/L	Avg	13.6	µg/L
66	2/28/2018	004	8.2	µg/L	Max	12.1	µg/L
67	2/28/2018	004	4.7	µg/L	Avg	8.04	µg/L
68	2/28/2018	005	8.2	µg/L	Max	57.6	µg/L
69	2/28/2018	005	4.7	µg/L	Avg	52.8	µg/L
70	2/28/2018	007	4.7	µg/L	Avg	89.7	µg/L
71	2/28/2018	007	8.2	µg/L	Max	96.8	µg/L
72	2/28/2018	008	8.2	µg/L	Max	10.9	µg/L
73	2/28/2018	008	4.7	µg/L	Avg	7.65	µg/L
74	2/28/2018	009	8.2	µg/L	Max	11.6	µg/L
75	2/28/2018	009	4.7	µg/L	Avg	9.59	µg/L
76	2/28/2018	014	8.2	µg/L	Max	43	µg/L
77	2/28/2018	014	4.7	µg/L	Avg	43	µg/L
78	2/28/2018	036	4.7	µg/L	Avg	7.92	µg/L
79	3/31/2018	004	8.2	µg/L	Max	9.45	µg/L
80	3/31/2018	004	4.7	µg/L	Avg	9.18	µg/L
81	3/31/2018	005	4.7	µg/L	Avg	62.1	µg/L
82	3/31/2018	005	8.2	µg/L	Max	67.6	µg/L
83	3/31/2018	008	4.7	µg/L	Avg	37.7	µg/L
84	3/31/2018	008	8.2	µg/L	Max	41	µg/L
85	3/31/2018	009	8.2	µg/L	Max	35.8	µg/L
86	3/31/2018	009	4.7	µg/L	Avg	31	µg/L
87	3/31/2018	014	8.2	µg/L	Max	39.3	µg/L

88	3/31/2018	014	4.7	µg/L	Avg	39.3	µg/L
89	4/30/2018	001	8.2	µg/L	Max	11.4	µg/L
90	4/30/2018	001	4.7	µg/L	Avg	11.4	µg/L
91	4/30/2018	005	8.2	µg/L	Max	58.2	µg/L
92	4/30/2018	005	4.7	µg/L	Avg	49.7	µg/L
93	4/30/2018	008	4.7	µg/L	Avg	45.1	µg/L
94	4/30/2018	008	8.2	µg/L	Max	49.7	µg/L
95	4/30/2018	009	8.2	µg/L	Max	44.6	µg/L
96	4/30/2018	009	4.7	µg/L	Avg	36.5	µg/L
97	4/30/2018	014	8.2	µg/L	Max	35.63	µg/L
98	4/30/2018	014	4.7	µg/L	Avg	35.63	µg/L
99	4/30/2018	036	4.7	µg/L	Avg	5.16	µg/L
100	4/30/2018	082	4.7	µg/L	Avg	16.41	µg/L
101	4/30/2018	082	8.2	µg/L	Max	16.41	µg/L
102	5/31/2018	001	8.2	µg/L	Max	8.79	µg/L
103	5/31/2018	001	4.7	µg/L	Avg	8.79	µg/L
104	5/31/2018	002	4.7	µg/L	Avg	4.73	µg/L
105	5/31/2018	005	8.2	µg/L	Max	64.9	µg/L
106	5/31/2018	005	4.7	µg/L	Avg	55	µg/L
107	5/31/2018	008	4.7	µg/L	Avg	39.4	µg/L
108	5/31/2018	008	8.2	µg/L	Max	42	µg/L
109	5/31/2018	009	8.2	µg/L	Max	40.8	µg/L
110	5/31/2018	009	4.7	µg/L	Avg	37	µg/L
111	6/30/2018	008	4.7	µg/L	Avg	8.65	µg/L
112	6/30/2018	008	8.2	µg/L	Max	8.65	µg/L
113	6/30/2018	009	8.2	µg/L	Max	10.9	µg/L
114	6/30/2018	009	4.7	µg/L	Avg	9.66	µg/L
115	7/31/2018	005	8.2	µg/L	Max	27.1	µg/L
116	7/31/2018	005	4.7	µg/L	Avg	13.6	µg/L
117	8/31/2018	003	4.7	µg/L	Avg	5.35	µg/L
118	8/31/2018	008	4.7	µg/L	Avg	6.86	µg/L
119	8/31/2018	008	8.2	µg/L	Max	9.38	µg/L
120	9/30/2018	007	4.7	µg/L	Avg	126	µg/L
121	9/30/2018	007	8.2	µg/L	Max	126	µg/L
122	10/31/2018	004	8.2	µg/L	Max	8.24	µg/L
123	10/31/2018	004	4.7	µg/L	Avg	5.13	µg/L
124	11/30/2018	008	4.7	µg/L	Avg	6.36	µg/L
125	11/30/2018	008	8.2	µg/L	Max	10.8	µg/L
126	12/31/2018	004	8.2	µg/L	Max	14.6	µg/L

127	12/31/2018	004	4.7	µg/L	Avg	10.7	µg/L
128	12/31/2018	008	4.7	µg/L	Avg	10.1	µg/L
129	12/31/2018	008	8.2	µg/L	Max	16.4	µg/L
130	1/31/2019	002	4.7	µg/L	Avg	5.22	µg/L
131	1/31/2019	004	4.7	µg/L	Avg	17.6	µg/L
132	1/31/2019	004	8.2	µg/L	Max	19.0	µg/L
133	1/31/2019	008	4.7	µg/L	Avg	42.9	µg/L
134	1/31/2019	008	8.2	µg/L	Max	59.8	µg/L
135	1/31/2019	008	8.2	µg/L	Max	26.0	µg/L
136	2/28/2019	004	4.7	µg/L	Avg	8.69	µg/L
137	2/28/2019	004	8.2	µg/L	Max	12.5	µg/L
138	2/28/2019	008	4.7	µg/L	Avg	23.8	µg/L
139	2/28/2019	008	8.2	µg/L	Max	33.1	µg/L
140	2/28/2019	008	8.2	µg/L	Max	14.5	µg/L
141	3/31/2019	004	4.7	µg/L	Avg	14.3	µg/L
142	3/31/2019	004	8.2	µg/L	Max	16.0	µg/L
143	3/31/2019	008	4.7	µg/L	Avg	23.8	µg/L
144	3/31/2019	008	8.2	µg/L	Max	25.7	µg/L
145	4/30/2019	008	8.2	µg/L	Max	21.9	µg/L
146	4/30/2019	002	4.7	µg/L	Avg	5.55	µg/L
147	4/30/2019	008	4.7	µg/L	Avg	21.7	µg/L
148	4/30/2019	008	8.2	µg/L	Max	34.9	µg/L
149	4/30/2019	008	8.2	µg/L	Max	8.5	µg/L
150	5/30/2019	004	4.7	µg/L	Avg	7.96	µg/L
151	5/30/2019	004	8.2	µg/L	Max	9.22	µg/L
152	5/30/2019	008	4.7	µg/L	Avg	22.8	µg/L
153	5/30/2019	008	8.2	µg/L	Max	24.5	µg/L
154	5/30/2019	008	8.2	µg/L	Max	21.0	µg/L
155	6/30/2019	002	4.7	µg/L	Avg	5.28	µg/L
156	6/30/2019	002	8.2	µg/L	Max	9.09	µg/L
157	6/30/2019	008	4.7	µg/L	Avg	20.9	µg/L
158	6/30/2019	008	8.2	µg/L	Max	26.2	µg/L
159	6/30/2019	008	8.2	µg/L	Max	15.5	µg/L

41. The excessive selenium concentrations in Brooks Run's discharges are contributing to the impairment of the receiving streams. According to WVDEP's 2016 § 303(d) List (p. 14),

the unnamed tributary to Missouri Creek, Missouri Creek (Outlets 001 through 003) and Glade Run (Outlet 005) are listed as impaired for selenium.

### **Violations of Water Quality Standards**

42. In July 2002, prior to mining, Brooks Run's consultant performed water quality and benthic sampling at 22 locations in streams that could be affected by the Seven Pines Mine. After mining, Brooks Run's consultant performed additional water quality and benthic sampling at six different locations, three of which are close to earlier locations. The table below compares the 2002 baselines pre-mining and 2013 through 2017 post-mining water quality and West Virginia Stream Condition Index ("WVSCI") scores at the three locations that are downstream of active operations at the Seven Pines Mine:

Location	2002 Sample Point	2013-17 Sample Point	WVSCI/Conductivity					
			2002	2013	2014	2015	2016	2017
Below 007 in Kate Run	KR-1	BASDKR	76/90	48/987	ND/930	40/198	47/1831	No Flow
Below 001, 002, 003 in UT Missouri Creek	UTMC-1	BASUUTMC	73/210	59/1757	61/1184	62/659	66/787	58/2160
Below 010 in Missouri Creek	MC-1	BASDMC	71/340	61/1216	58/1962	60/1410	58/1754	49/1930

43. According to WVDEP's most recent 303(d) List streams with WVSCI scores below 72 are biologically impaired.

44. In 2002, prior to mining, the streams were unimpaired with high WVSCI scores and low conductivity. Between 2013 and 2017, after mining, the streams were impaired with lower WVSCI scores and higher conductivity. Each of the three sampling locations near the baseline locations show impairment. Moreover, the WVDEP has listed Laurel Creek and the Birch River

as biologically impaired. Upon information and belief, Plaintiffs allege that discharges of high conductivity from valley fills at the Seven Pines Mine are causing biological impairment in downstream waters.

45. Brooks Run's discharge monitoring reports show that it discharged the following maximum amounts of conductivity ("Cond."), sulfate ("Sulf."), and total dissolved solids ("TDS") from Outlets 001, 002, and 003. (Months with blank cells had no flow.)

	Outlet 001			Outlet 002			Outlet 003		
Month	Cond.	Sulf.	TDS	Cond.	Sulf.	TDS	Cond	Sulf.	TDS
Apr-17	1955	742	1760	2071	837	2150			
May-17				1978	1055	2022			
Jun-17				2219	1097	1910			
Jul-17				2315	961	2036			
Aug-17				2489	1072	2426			
Sept-17				2753	1260	2706			
Oct-17				2771	1136	2396			
Nov-17				2272	1209	1980			
Dec-17				2465	1011	2056			
Jan-18	2367	1072	2008	1980	717	1650			
Feb-18	1882	918	1552	1688	726	1488	1671	653	1532
Mar-18	1980	717	1650	2122	1027	1818			
Apr-18	1580	621	1312	1969	835	1776			
May-18	1662	571	1454	1827	746	1638			
Jun-18	1877	618	1628	2190	702	2002			
Jul-18	2030	823	1780	2350	739	2062			
Aug-18	1882	458	1706	2090	356	1906	2340	119	2212
Sep-18	2130	665	2068	1958	699	1940			
Oct-18				1769	735	1720			
Nov-18				1825	636	1752			
Dec-18				1795	649	1696			
Jan-19				1750	494	1548			
Feb-19				1972	467	1876			
Mar-19				1736	807	1600			
Apr-19				2140	368	2066			
May-19				1908	721	1838			
June-19				1868	535	1774			

46. Brooks Run's discharge monitoring reports show that it discharged the following maximum amounts of conductivity ("Cond."), sulfate ("Sulf."), and total dissolved solids ("TDS") from Outlets 004, 005, and 008, and 009. (Months with blank cells had no flow.)

	Outlet 004			Outlet 005			Outlet 008			Outlet 009		
Month	Cond.	Sulf.	TDS	Cond.	Sulf.	TDS	Cond.	Sulf.	TDS	Cond.	Sulf.	TDS
Apr-17	1873	874	1838				1860	785	1926			
May-17	1733	792	1848				1782	668	1914			
Jun-17	2001	756	2008				1967	895	1908			
Jul-17	2288	1101	2058				2265	1029	2022			
Aug-17	2320	1077	2134				2350	949	2230			
Sept-17	2498	1126	2382				2533	1021	2446			
Oct-17	2536	1203	2254				2470	923	2120			
Nov-17	2186	1092	1890				2191	991	1900			
Dec-17	2245	1024	1916				2243	957	1896			
Jan-18	1877	730	1528	1985	695	1730	2074	807	1666	2037	835	1732
Feb-18	1633	682	1352	1936	841	1676	1551	594	1322	1567	604	1278
Mar-18	1946	920	1672	2125	845	1828	1966	750	1734	2488	1080	2234
Apr-18	1815	780	1660	2115	957	1862	2039	851	1892	2478	1077	2328
May-18	1581	563	1340	2229	883	2088	1846	798	1614	2476	1071	2340
Jun-18	1869	453	1868	2230	248	2164	2090	860	1860	2590	689	2366
Jul-18	1886	832	1658	2320	1060	2120	2270	795	2020			
Aug-18	1786	100	1774				2030	209	1970			
Sep-18	1806	529	1710				1984	394	1660			
Oct-18	1704	367	1680				1707	423	1626			
Nov-18							1716	410	1736			
Dec-18	1667	251	1636				1863	294	1552			
Jan-19	1511	494	1376				1870	548	1738			
Feb-19	1650	410	1612				2020	550	1900			
Mar-19	1542	906	1386				1976	267	1888			
Apr-19	1833	296	1728				2160	593	2054			
May-19	1536	339	1352				1999	623	1998			
June-19	1638	976	1576				1952	460	1900			

47. Brooks Run's discharge monitoring reports show that it discharged the following maximum amounts of conductivity ("Cond."), calcium ("Ca"), magnesium ("Mg"), sodium ("Na"), sulfate ("Sulf."), potassium ("K"), and total dissolved solids ("TDS") from Outlet 007. (Months with blank cells had no flow.)

Month	Cond.	Ca	Mg	Na	Sulf.	K	TDS
Apr-17	1722	223	136	5	569	19	1486
May-17							
Jun-17							
Jul-17							
Aug-17							
Sep-17							
Oct-17							
Nov-17							
Dec-17							
Jan-18	1949	234	156	6	768	20	1652
Feb-18	2029	258	167	6	830	22	1708
Mar-18							
Apr-18							
May-18	1812	212	144	5	664	20	1600
Jun-18							
Jul-18							
Aug-18							
Sep-18	2090	313	192	6	529	26	1794

48. In 2011, EPA scientists summarized the existing science connecting conductivity and biological degradation in an EPA report entitled, “A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams.” That report, which was peer-reviewed by top scientists on EPA’s Science Advisory Board, used EPA’s standard method for deriving water quality criteria to derive a conductivity benchmark of 300  $\mu\text{S}/\text{cm}$ . *Id.* at xiv-xv. According to the species sensitivity distribution in the benchmark, on average, five percent of species are lost when conductivity rises to 295  $\mu\text{S}/\text{cm}$ , over 50% are lost at 2000  $\mu\text{S}/\text{cm}$ , and close to 60% are lost at 3000  $\mu\text{S}/\text{cm}$ . *Id.* at 18. EPA considered potential confounding factors, including habitat, temperature, deposited sediments and pH, and concluded that none of them altered the relationship between conductivity and biological decline or the benchmark value of 300  $\mu\text{S}/\text{cm}$ . *Id.* at 41, B-22. EPA found that the loss of aquatic species from increased conductivity was “a severe and clear effect.” *Id.* at A-37. EPA also conducted a detailed causal assessment and concluded that there

is a causal relationship between conductivity and stream impairment in West Virginia. *Id.* at A-39. Finally, EPA's benchmark report analyzed the relationship between the WVSCI biological impairment threshold and conductivity levels, and found that a WVSCI score of 64 (close to the impairment threshold of 68) corresponds to streams with conductivity of about 300  $\mu\text{S}/\text{cm}$  on average. *Id.* at A-36. A statistical analysis included in the benchmark determined that at a conductivity level of 300  $\mu\text{S}/\text{cm}$  a stream is 59% likely to be impaired and at 500  $\mu\text{S}/\text{cm}$  a stream is 72% likely to be impaired. *Id.*

49. The ions found coming out of Outlet 007 are consistent with those associated with coal mining pollution in this region (Pond et al. 2008; Palmer et al. 2010; Bernhardt and Palmer 2011; Lindberg et al. 2012; Pond et al. 2010; Pond et al. 2012; Pond et al. 2014; Kunz 2013). The ionic mixture of calcium, magnesium, sulfate, and bicarbonate in alkaline mine water causes the loss of aquatic macroinvertebrates in Appalachian areas where surface coal mining is prevalent; it is the mixture of ions that causes the biological impairment (Cormier et al. 2013b; Cormier and Suter 2013). This mixture also has significant adverse effects on fish assemblages (Hitt 2014; Hopkins 2013) and has toxic effects on aquatic life, including mayflies (Kunz 2013; Echols 2010; Kennedy 2004).

50. Bernhardt et al. (2012) concluded that:

The extent of surface mining within catchments is highly correlated with the ionic strength and sulfate concentrations of receiving streams. Generalized additive models were used to estimate the amount of watershed mining, stream ionic strength, or sulfate concentrations beyond which biological impairment (based on state biocriteria) is likely. We find this threshold is reached once surface coal mines occupy >5.4% of their contributing watershed area, ionic strength exceeds 308  $\mu\text{S}/\text{cm}^{-1}$ , or sulfate concentrations exceed 50  $\text{mg}/\text{L}^{-1}$ .

51. A 2016 study using simulated mine effluents in an experimental stream under controlled conditions measured the same adverse effects on aquatic organisms at conductivity levels of 300  $\mu$ S/cm and lower (Clements and Kotalik 2016).

52. In sum, the available evidence shows that, as a result of mining operations at Brooks's Seven Pines Mine, the receiving streams have (1) elevated chemical ions (including sulfate, calcium, magnesium, and sodium), measured as increased conductivity, and (2) biologically impaired aquatic life. Brooks is discharging high levels of ionic pollutants, measured as conductivity, from Outlets 001, 002, 003, 007, 008, and 009 that are causing or materially contributing to biological impairment and violations of the narrative water quality standard for biological integrity in those streams.

**FIRST CLAIM FOR RELIEF  
(CWA § 402 Permit Violations)**

53. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 52 above.

54. Since at least March 2017, Brooks Run has discharged and continues to discharge pollutants from point sources, i.e. Outlets 001 through 009, 14, 36, and 82 into tributaries of Laurel creek and the Birch River pursuant to WV/NPDES Permit Number WV1009885.

55. The Birch River, Laurel Creek and their tributaries, including Missouri Creek, Chuffy Run, Bragg Creek, Kate Run and other tributaries receiving discharges from the Seven Pines Mine are waters of the United States within the meaning of 33 U.S.C. § 1362(7).

56. Since at least March 2017, Brooks Run has discharged and continues to discharge total recoverable selenium in violation of the limits for permit WV1009885 at the outfalls and in the months listed in Paragraph 40 *supra*.

57. Since at least March 2017, Brooks Run has discharged and continues to discharge pollutants with cause ionic stress and biological impairment in the Birch River, Laurel Creek and their tributaries, including Missouri Creek, Chuffy Run, Bragg Creek, Kate Run and other tributaries receiving discharges from the Seven Pines Mine in violation of the narrative water quality standards for biological integrity and aquatic life protection 47 C.S.R. §§ 2-3.2.3 & 2-3.2.i.

58. The condition incorporated into Part C of WV/NPDES Permit No. WV1009885 that provides that “[t]he discharge or discharges covered by [this] WV/NPDES permit are to be such quality so as not to cause a violation of applicable water quality standards promulgated by 47 CSR 2” is an enforceable “effluent standard[] or limitation[]” for purposes of Section 505(a)(1) of the Clean Water Act because it is a condition of a permit issued under Section 402 of the Act. 33 U.S.C. § 1365(f).

59. The narrative water quality standards for biological integrity and aquatic life protection are therefore by reference through Part C of Brooks Run’s WV/NPDES Permit WV1009885.

60. Based on the WVSCI scores and measured concentrations of ionic pollutants and specific conductivity in Brooks Run’s discharges, and Brooks Run’s failure to take corrective actions to address those conditions, Brooks Run is in violation of permit WV1009885.

61. Brooks Run is subject to an injunction under the CWA to cease its permit violations.

62. Brooks Run is subject to civil penalties for each day of violation of its permits.

**SECOND CLAIM FOR RELIEF  
(SMCRA Violations)**

63. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 62 above.

64. Brooks Run's WVSCMRA Permit S201002 requires it to comply with performance standards of the WVSCMRA. 38 W.Va C.S.R. § 2-3.33(c).

65. Those performance standards require that "discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards." 38 W.Va. C.S.R. § 2-14.5.b.

66. West Virginia water quality standards prohibit discharges of "[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life" or that cause "significant adverse impacts to the chemical, physical, hydrologic, or biological components of aquatic ecosystems." 47 C.S.R. §§ 2-3.2.e & 2-3.2.i.

67. WVSCMRA performance standards also provide that "[a]ll surface mining and reclamation activities shall be conducted . . . to prevent material damage to the hydrologic balance outside of the permit area." 38 W.Va. C.S.R. § 2-14.5. "Material damage" at a minimum includes violations of water quality standards.

68. By violating NDPES permit effluent limitations and West Virginia water quality standards at its Seven Pines Mine, Brooks Run has also violated and continues to violate the performance standards incorporated as conditions to WSCMRA Permit S201002.

69. Federal and State performance standards also require that "[i]f drainage, control, restabilization, and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42, the operator shall use and maintain the necessary water-treatment facilities or water quality controls." 30 C.F.R. § 816.41(d)(1); *see also*, 38 C.S.R. § 2-14.5.c ("Adequate facilities shall be installed, operated and maintained using the best technology currently available in accordance with

the approved preplan to treat any water discharged from the permit area so that it complies with the requirements of subdivision 14.5.b. of this subsection.”).

70. The violations identified herein show that Brooks Run’s existing treatment methods are insufficient to meet the above requirement. Thus, the performance standards require Brooks Run to construct a system that will effectively treat its effluent to levels that comply with all applicable effluent limitations and water quality standards.

71. Each violation of Brooks Run’s WVSCMRA permits is a violation of SMCRA and is enforceable under the citizen suit provision of SMCRA, 30 U.S.C. § 1270(a).

72. Brooks Run is subject to an injunction under SMCRA ordering it to cease its permit violations.

### **RELIEF REQUESTED**

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order:

1. Declaring that Brooks Run has violated and is in continuing violation of the CWA and SMCRA;
2. Enjoining Brooks Run from operating its Seven Pines Mine in such a manner as will result in further violations of WV/NPDES Permit No. WV1009885 and WVSCMRA Permit S201002;
3. Order Brooks Run to immediately comply with the effluent limitations in WV/NPDES Permit No. WV1009885;
4. Ordering Brooks Run to immediately comply with the terms and conditions of WVSCMRA Permit S201002;
5. Ordering Brooks Run to pay appropriate civil penalties for each day of violation of its NPDES permits pursuant to 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d) and 1365(a);

6. Ordering Brooks Run to conduct monitoring and sampling to determine the environmental effects of its violations, to remedy and repair environmental contamination and/or degradation caused by its violations, and restore the environment to its prior uncontaminated condition;

7. Awarding Plaintiffs their attorney and expert witness fees and all other reasonable and expenses incurred in pursuit of this action; and

8. Granting other such relief as the Court deems just and proper.

Respectfully submitted,

/s/ **Derek O. Teaney**

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